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on the theory that the donor intended a way to the navigable highway, whatever its bounds. *Hoboken Land, etc., Co.* v. *Mayor, etc., of Hoboken*, 36 N. J. L. 540. And the decision here seems sound in its averment that a street to a shifting water-mark was contemplated, and that allowance was made in the condemnation proceedings for the extension of the soil. No decisions were found in regard to accretion upon property subject to a private right of way; but it seems clear that the creation of rights by grant and covenant are subject to the same inferences as is their creation by dedication and eminent domain proceedings. *Cf. Lockwood* v. *New York, etc., Railroad Co.*, 37 Conn. 387. Easements, public or private, by prescription, present a harder case; for it is difficult to conceive of constructive adverse use of property which throughout the period of prescription was not in existence.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — SUIT AGAINST STATE DISPENSARY COMMISSION. — The Legislature of South Carolina created a commission to wind up the affairs of the state liquor business. The complainants, who claimed for liquor sold to the state, sued the commission in the federal court for an accounting, an injunction, and a receivership. *Held*, that the suit is one against the state within the prohibition of the Eleventh Amendment. *Murray* v. *Wilson Distilling Co.*, U. S. Sup. Ct., Apr. 5, 1909. This decision reverses the decision of the lower court discussed in 22 HARV. L. REV. 289.

FEDERAL COURTS — RELATIONS OF STATE AND FEDERAL COURTS — EFFECT OF CONFORMITY STATUTE ON COMMON LAW RULES OF EVIDENCE. — Rev. Stat. U. S. 1878, § 721, enacts that the laws of the several states, except where the Constitution, treaties, and statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. And § 858, after enumerating certain exceptions, adds that in all other respects the laws of the states shall be the rules of decision as to the competency of witnesses. *Held*, that whether the common law power of a court to compel a plaintiff to submit to a surgical examination be treated as strictly a matter of practice or as involving a question of evidence, in neither case is the federal court bound by the common law decisions of the highest court of the state within which it is sitting. *Chicago & N. W. Ry. Co.* v. *Kendall*, 167 Fed. 62 (C. C. A., Eighth Circ.).

Rev. Stat. U. S 1878, §§ 721 and 858, have been construed to include state statutes as to evidence in civil trials. *Conn. Mutual Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 254; *Butler* v. *Fayerweather*, 91 Fed. 458, 460. And there is some authority for treating decisions of the highest state court as equally binding with state statutes. *Stewart* v. *Morris*, 89 Fed. 290; see *Nashua Savings Bank* v. *Anglo-American, etc., Co.*, 189 U. S. 221, 228. But these holdings are based upon dicta or cases which deal solely with statutory rules of evidence. See *Ex parte Fisk*, 113 U. S. 713, 720. On the other hand, the federal courts, when presented on appeal with questions of evidence, do not consider state decisions as controlling. *Cf. New Jersey Steamboat Co.* v. *Brockett*, 121 U. S. 637, 649. The principal case argues that common law rules of evidence are the creation of the courts rather than "laws" within § 721, and that in the absence of statutes federal courts should be independent in this respect. *Cf. Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 370. It is believed that on grounds of expediency this technical distinction is justifiable; for the great burden and delay to the federal judiciary otherwise necessary would far outweigh the inconvenience to the local bar under the present rule.

GENERAL AVERAGE — INTERESTS LIABLE TO CONTRIBUTION — WHAT LAW GOVERNS. — The master of a vessel chartered for a voyage from New York to Portugal borrowed money on the security of the freight, for necessary expenses, giving his draft therefor. The vessel became disabled and had to be towed from the Azores to Portugal, for which salvage service a large recovery was had in England. According to New York law the master's draft, or bottomry bond, is

not liable to contribute in general average; by Portuguese law such a draft must contribute. The owner of the vessel paid the loan. *Held*, that the amount received in payment of the draft is chargeable with a proportionate liability in the computation of general average contribution. *Monsen* v. *Amsinck*, 166 Fed. 817.

General average contribution does not arise from any implied contract, but has become a part of maritime law, adopted from the old Rhodian laws. See *Burton* v. *English*, 12 Q. B. D. 218. The principal case follows the general rule that the law of the port of destination governs the adjustment and payment of general average. *Loring* v. *Neptune Ins. Co*, 20 Pick. (Mass.) 411. If, however, the voyage is completely broken up and the ship and cargo finally part company before reaching the port of destination, the law of the place where the interests are separated governs. *Fletcher* v. *Alexander*, L. R. 3 C. P. 375. But if the cargo is forwarded by the original master to the port of destination, then its laws govern. *Nat. Board* v. *Melchers*, 45 Fed. 643. Although it cannot be said that any particular court creates the right to general average contribution, it is only proper, when goods have come within the jurisdiction of a certain court and are subject to general average, that the schedule of distribution as laid down by that court should be recognized everywhere.

HIGHWAYS — REGULATION AND USE — UNDERGROUND LICENSES. — The plaintiff, a public service corporation, was licensed to run pipe lines of complicated structure under the highway. The defendant secured a permit to build a vault under the adjacent sidewalk up to the curb. In the course of this later construction the soil below the plaintiff's pipe line settled, resulting in injury to the pipes. The defendant was free from negligence. *Held*, that the defendant is liable. *New York Steam Co.* v. *Foundation Co.*, 40 N. Y. L. J. 2723 (N. Y., Ct. App., March 16, 1909).

The natural right of lateral support is incident to an estate in land. *Schultz* v. *Bower*, 57 Minn. 493. It seems never to have been extended in favor of mere rights in land. Its application to situations like that in the case under consideration would unjustly throw additional burdens on the proposed servient tenement. *Cf. Gayford* v. *Nicholls*, 9 Exch. 702. And in applying the maxim that no man may so use his own as to injure the property of another the court affords no *ratio decidendi;* for the very question in issue is whether there has been a legal injury. See *Bonomi* v. *Backhouse*, 27 L. J. Q. B. 378, 388. Many uses of land resulting in damage to neighbors are *damna absque injuria. Booth* v. *Ry. Co.*, 140 N. Y. 267. In these cases liability depends upon the reasonableness of the exercise of the right of property. *Steel Co.* v. *Kenyon*, 11 Ch. D. 782. The present case seems to be one of first impression. Since the defendant was exercising a mere license, the policy against restraining the natural use of property has no application; and in casting a liability on one who for private rather than for public purposes undertakes work on land not his own resulting in damage to the property of another, the court perhaps reaches a desirable result.

INJUNCTIONS — ACTS RESTRAINED — COLLECTION OF UNCONSTITUTIONAL TAX. — The plaintiff company was engaged in supplying the defendant city with water. The city by an ordinance levied a license tax upon the company, which then sought an injunction from a federal court to restrain its collection as an impairment of the obligation of the original franchise granted by the city. The defendant city demurred. *Held*, that the plaintiff is not entitled to an injunction, since it has an adequate remedy at law. *Boise, etc., Water Co.* v. *Boise City*, U. S. Sup. Ct., April 5, 1909.

Injunctions against the exercise of the taxing power of the state or federal sovereignty seem clearly unjustifiable where the remedy at law is adequate. In almost all the states, accordingly, the courts will not enjoin the collection of taxes imposed by the legislature on the sole ground of their unconstitutionality. *Mechanics', etc., Bank* v. *Debolt*, 1 Oh. St. 591. By statute the federal courts are precluded from restraining the assessment or collection of federal taxes on